U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 November 2002

Case No: 2002-BLA-5014

In the Matter of

HERMAN KENNETH FIELDS,
Claimant

v.

LEECO, INC.,
Employer,

TRANSCO ENERGY COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Edmund Collett, Esquire
For the claimant

Lois A. Kitts, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On February 8, 2002, this case was referred to the Office of Administrative Law Judges for a formal hearing. Following proper notice to all parties, a hearing was held on October 3, 2002 in Hazard, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. JX refers to the joint stipulation of medical evidence. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. whether the claim was timely filed;

2. the length of the miner's coal mine employment;

3. whether the miner has pneumoconiosis as defined by the Act and regulations;

4. whether the miner's pneumoconiosis arose out of coal mine employment;

5. whether the miner is totally disabled;

6. whether the miner's disability is due to pneumoconiosis; and

7. whether the evidence establishes a material change in conditions within the meaning of Section 725.309(d).

The employer also contests other issues that are identified at line 18 on the list of issues. (DX 25). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Herman Kenneth Fields, was born on October 16, 1951. (DX 1). Mr. Fields married Charlene Bowling on June 29, 1973, and they divorced in 1993. *Id.* On his application for benefits, claimant alleged that he has one dependent child, daughter Kaylee R. Fields, who was born on October 31, 1989. *Id.* Claimant's daughter lives with her mother in Smilax, Kentucky. *Id.*

Claimant graduated from high school in 1969, and he served in the Air Force from 1969 to 1973. (Tr. 11-12; DX 7, p. 5). In the Air Force, Claimant was an air traffic controller. (DX 7, p. 6). After he was discharged in 1974, Claimant began coal mine employment.

Claimant testified that his breathing problems began before he stopped coal mining. (Tr. 15-16). Since he quit, however, his problems have worsened. (Tr. 16). He stated that he lacks stamina, wheezes, and experiences shortness of breath. *Id.* He also coughs and wheezes at night. (Tr. 17). Beyond his breathing difficulties, Claimant suffers from a myriad of problems, including arthritis, degenerative discs in his back, high blood pressure, high cholesterol, and depression. (Tr. 17-18). Currently, Claimant treats his medical problems with Albuterol, Atrovent, Tyzak, hydrochlorothiazide, Loritab, Zantax, Amotripolene, Salsolate, and inhalers. (Tr. 17, 20-21).

Claimant testified that he has smoked "on and off" throughout his life. (Tr. 12). He estimated that he had smoked for fifteen years. *Id.*

Mr. Fields filed his instant application for black lung benefits on January 24, 2001. (DX 1). The Office of Workers' Compensation Programs issued a Proposed Decision and Order denying the claim on November 1, 2001. (DX 9). The Director determined that Claimant demonstrated the presence of pneumoconiosis and its etiology but failed to demonstrate total disability or its etiology. Pursuant to claimant's November 5, 2001 request for a formal hearing, (DX 10), the case was transferred to the Office of Administrative Law Judges. (DX 25).

Claimant filed his original claim for benefits on August 26, 1996. (DX 24-316). On January 20, 1999, an administrative law judge denied Claimant benefits, finding Claimant failed to demonstrate the presence of pneumoconiosis or a totally disabling respiratory impairment. (DX 24-39 to 48). Claimant appealed, and the Benefits Review Board affirmed the administrative law judge's findings. (DX 24-1 to 4).

Timeliness

Under Section 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been

communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. Because the record contains no evidence that claimant received the requisite notice more than three years prior to filing his claim for benefits, I find that this claim was timely filed.

Coal Mine Employment

The duration of a claimant's coal mine employment is relevant to the applicability of vari-ous statutory and regulatory presumptions. At the hearing, the employer stipulated that Mr. Fields worked for nineteen years six months in qualifying coal mine work. (Tr. 7). Based upon my review of the record, I accept the stipulation as accurate and credit claimant with nineteen years six months of coal mine employment.

During his coal mining career, Claimant performed various jobs, including shuttle car driver, coal shooter, belt line operator, and scoop operator. (Tr. 13, 15). Claimant testified that all of the jobs required heavy manual labor and involved substantial exposure to coal dust. (Tr. 13-14). Claimant reported that his final coal mining job was a scoop operator. (DX 3). He stated that he worked six days per week, stood seven hours per shift, and lifted and carried as much as fifty pounds several times per day. *Id.* I find Claimant's testimony and his description of his coal mine work establish that he engaged in moderately heavy labor.

Medical Evidence[1]

The medical evidence of the instant case is subject to new limitations on the development of evidence contained in 20 C.F.R. §725.414. And, the instant record contains evidence not in compliance with the new regulations. The applicable regulations allow claimants and responsible operators to submit for review two chest x-rays, two pulmonary function tests, two arterial blood gas studies, and two narrative medical reports. In addition, the parties are permitted to enter rebuttal evidence, which may include one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, autopsy, and biopsy submitted by the opposing party.

First, Employer has submitted too many x-ray interpretations. The record contains a total of five x-ray interpretations. At most, Employer is allowed to submit three x-ray interpretations, assuming one is an interpretation in rebuttal of an interpretation submitted by the claimant. I cannot consider the additional x-ray interpretations. The parties' joint stipu-

[1] The instant claim is for modification. Accordingly, I shall only examine the newly submitted evidence to answer my initial inquiry of whether Claimant has demonstrated a material change in conditions. If the newly submitted evidence demonstrates a material change in conditions, I shall examine the entire record to determine if Claimant is entitled to benefits. The previously submitted x-ray, pulmonary function test, and arterial blood gas study evidence, as summarized in the January 20, 1999, Decision and Order, (DX 24-39 to 24-48), is incorporated by reference into this Decision and Order. For clarity, I shall catalog and discuss the previously submitted narrative medical evidence.

lation of medical evidence did not list the two interpretations from Dr. Wiot located in the record. (EX 2-3). If I remove Dr. Wiot's interpretations from consideration, Employer's x-ray proof complies with the regulatory limitations. Accordingly, I shall be guided by the parties' joint stipulation, and I shall not consider the x-ray interpretations of Dr. Wiot.

Second, Employer has submitted too many medical reports for consideration. The instant record contains three medical reports: an independent medical review by Dr. Vuskovich, an examination opinion by Dr. Broudy, and an independent medical review by Dr. Broudy. At most, Employer is limited to two medical reports. 20 C.F.R. §725.414 (a)(3)(i). Employer is allowed to produce a medical report that both contains an examination opinion and an evidence review opinion, and the regulations provide that the medical report only counts as one report. §725.414 (a)(1). However, Dr. Broudy's examination opinion and independent medical review opinion were delivered separately, under different cover, and stylized as different exhibits. Employer's submissions did not contemplate utilization of the allowance in section 725.414(a)(1). Thus, I shall not consider the employer's last medical report submitted – Dr. Broudy's March 22, 2001 medical report. (EX 6).

A. X-ray reports[2]

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 5	02/20/01	02/20/01	Baker/B	2/1 pneumoconiosis
DX 6	02/20/01	03/15/01	Sargent/B/BCR	Read for quality only. Film Quality = 2.
DX 23	02/20/01	11/07/01	Poulos/B/BCR	Negative.
EX 6	03/22/01	03/22/01	Broudy/B	Negative
DX 22	03/22/01	10/18/01	Poulos/B/BCR	Negative.

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. §718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

B. Pulmonary Function Studies[3]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 5 02/20/01	Baker	49 70'	3.08	4.54	123		Yes	Good cooperation and good comprehension.
DX 6 03/22/01	Broudy	49 70'	2.86 3.26*	3.92 4.46*	104 129*	0.73 0.73*	Yes	Great effort and great cooperation. Slight restriction and obstruction demonstrated.

*denotes testing after administration of bronchodilator

[3] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. §718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in "substantial compliance" with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

C. Arterial Blood Gas Studies[4]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 5	02/20/01	Baker	37	84	Resting	
EX 6	03/22/01	Broudy	36.6	84.7	Resting	

D. Narrative Medical Evidence

Newly Submitted Narrative Evidence

The newly submitted evidence contains three narrative physician opinions.

Dr. Glen Baker examined Claimant on February 20, 2001. (DX 5). Dr. Baker reviewed the miner's employment history and recorded that Mr. Fields claimed twenty years of coal mine employment. The doctor also took the claimant's social, medical, and familial histories, noting back and eye injuries and a sixteen year, one pack per day smoking history that has diminished to one-half pack per day currently. During the examination, Claimant's chief complaints were sputum production, wheezing, dyspnea upon exertion such as walking on level ground for several hundred feet, and orthopnea. In addition to his physical examination, Dr. Baker submitted Claimant to a chest x-ray, pulmonary function study, and an arterial blood gas study. After his examination, the doctor diagnosed 1) coal workers' pneumoconiosis based upon Claimant's chest x-ray and coal dust exposure; 2) chronic obstructive pulmonary disease with mild obstructive defect based upon Claimant's pulmonary function test results; and 3) chronic bronchitis based upon Claimant's history of cough, sputum production, and wheezing. Dr. Baker concluded that the etiology of Claimant's pneumoconiosis was coal dust exposure, whereas the etiology of Claimant's chronic obstructive pulmonary disease and chronic bronchitis was both coal dust exposure and cigarette smoking. Dr. Baker also opined that Claimant suffered from a mild respiratory impairment, as demonstrated by the pulmonary function test results, due to chronic bronchitis and pneumoconiosis. He attributed the impairment to Claimant's cigarette smoking and coal dust exposure. Dr. Baker stated, however, that Claimant retained the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment.

Dr. Matthew A. Vuskovich, board certified in occupational medicine, issued an independent medical review opinion on September 9, 2002. (EX 4). Dr. Vuskovich examined a wide array of Claimant's medical evidence, including narrative opinions and depositions of other physicians, x-ray interpretations, pulmonary function studies, and arterial blood gas studies. The majority of evidence reviewed by Dr. Vuskovich was produced over the

[4] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. §718.105(a).

previous decade. The doctor also stated that he understood Claimant to have a twenty year coal mine employment history and a twenty-two year, one pack per day smoking history. From his review of the narrative opinions detailed in his report, Dr. Vuskovich concluded that many physicians discovered physical findings consistent with obstructive pulmonary disease. The doctor did not comment on the physicians that concluded Claimant suffered from pneumoconiosis. He also concluded that the preponderance of the x-ray evidence was negative for pneumoconiosis, stating, "Simple coal workers' pneumoconiosis, without further respirable dust exposure[,] does not progress." *Id.* Dr. Vuskovich opined that Claimant's pulmonary function studies and arterial blood gas studies also failed to demonstrate the presence of pneumoconiosis or a totally disabling condition. In conclusion, the doctor opined that 1) there was no x-ray evidence of pneumoconiosis; 2) there was no pulmonary or respiratory impairment; and 3) there was chronic obstructive pulmonary disease caused by cigarette smoking.

Dr. Bruce Broudy, board-certified in internal medicine and pulmonary medicine, issued an independent medical review opinion on September 6, 2002. (EX 5). Dr. Broudy reviewed various medical evidence from the past decade, including narrative opinions from other physicians, pulmonary function tests, arterial blood gas studies, and chest x-rays. The doctor also reviewed two examination reports produced by himself. Dr. Broudy opined that the evidence did not support a diagnosis of pneumoconiosis. He commented that positive x-ray interpretations were outnumbered and outweighed by negative interpretations from physicians with better credentials. Dr. Broudy also opined that the evidence demonstrated no pulmonary impairment as the preponderance of the pulmonary function tests and arterial blood gas studies produced normal results. The doctor's opinion, however, diagnosed chronic obstructive pulmonary disease. Dr. Broudy stated that the disease developed after Claimant ended his coal mine employment.

Previously Submitted Narrative Evidence

Dr. Broudy issued an independent medical review on March 18, 1998. (DX 24-94). Dr. Broudy previously examined Claimant on April 7, 1997, and May 25, 1994. The doctor reiterated Claimant's social and medical histories, noting that Claimant had smoked one-half to one and one-half packs of cigarettes per day for over two decades and that Claimant had a twenty year coal mine employment history. Dr. Broudy mentioned that, at the times he examined Claimant, he found no evidence of pneumoconiosis. The doctor reviewed a myriad of medical evidence, including pulmonary function tests, arterial blood gas studies, chest x-rays, and narrative reports prepared by other physicians. Dr. Broudy opined that the evidence "clearly" did not justify a diagnosis of pneumoconiosis. (DX 24-95). He specifically pointed to the negative readings of record being more numerous and interpreted by better-qualified physicians. The doctor referred to no other medical evidence in his conclusion that pneumoconiosis was not present. The doctor further opined that Claimant retained the respiratory capacity to perform the work of an underground coal miner based upon "normal" pulmonary function tests and "virtually normal" arterial blood gas studies. (DX 24-96). He concluded, "[t]he evidence indicates that there has been no impairment which has arisen from the inhalation of coal mine dust." *Id.*

Dr. Broudy's deposition was taken on April 24, 1998. (DX 24-122). The doctor's testimony corroborates his previous written findings. Dr. Broudy explained that he diagnosed chronic bronchitis and back pain in his previous examinations of the claimant. (DX 24-94 and -134).

Attached to the doctor's deposition testimony were his April 7, 1997 and May 25, 1994 examination reports. In his 1997 examination, Dr. Broudy took complete social and medical histories for Claimant. He recorded nineteen years of coal mine employment for Claimant as a belt operator, general laborer, and scoop operator. The doctor recorded Claimant's chief complaints as back pain, shortness of breath, dyspnea upon minimal exertion, cough, ankle swelling, and chest pain. Beyond his physical examination, Dr. Broudy submitted Claimant to pulmonary function testing, an arterial blood gas study, and a chest x-ray. The doctor diagnosed chronic bronchitis and back pain, and he concluded that Claimant did not suffer from pneumoconiosis or a totally disabling pulmonary impairment. He did not state the rationale for his diagnosis concerning the presence of pneumoconiosis, but the doctor specifically mention the spirometry and blood gases when discussing Claimant's impairment level. Dr. Broudy opined that Claimant's chronic bronchitis was due to cigarette smoking.

In his 1994 examination, Dr. Broudy again took a complete patient history and performed a standard pulmonary examination and work-up. He diagnosed "probable" chronic bronchitis and back pain, but he did not find evidence of pneumoconiosis. (DX 24-155). He did not state the rationale for his diagnosis concerning the presence of pneumoconiosis, but the doctor specifically mentioned the spirometry and blood gases when discussing Claimant's impairment level. The doctor concluded that Claimant's dyspnea was non-pulmonary in origin. Dr. Broudy also opined that Claimant's chronic bronchitis was due to cigarette smoking.

Dr. Vuskovich examined Claimant on April 28, 1994. (DX 24-185). He recorded Claimant's twenty year coal mine employment history as a shuttle operator, drill operator, roof bolter, and scoop operator. The doctor also noted a fifteen year smoking history. During the examination, Claimant's chief complaints were dyspnea, chronic cough with sputum production, wheeze, and chest pain. Beyond his physical examination, Dr. Vuskovich submitted Claimant to a chest x-ray, pulmonary function study, and an electrocardiogram. The doctor diagnosed chronic bronchitis secondary to cigarette abuse. The doctor also opined that Claimant did not suffer from pneumoconiosis or a totally disabling respiratory condition. He concluded that Claimant was physically able, from a respiratory standpoint, to perform his usual coal mine employment. The doctor's report does not include a discussion of the rationales for his diagnoses beyond a stand-alone "Comment," under which the doctor wrote "normal pulmonary function." (DX 24-188).

Dr. Gregory Fino issued an independent medical review on April 11, 1998. (DX 24-98). Before reviewing the evidence, Dr. Fino noted that Claimant reported thirteen years of coal mine employment on a 1994 employment history form. In his report, the doctor reviewed chest x-ray interpretations, Dr. Baker's March 24, 1993 examination report, Dr.

Myer's September 28, 1993 examination report, Dr. Anderson's March 9, 1994 examination report, Dr .Vuskovich's April 28, 1994 examination report, Dr. Broudy's May 25, 1994 and April 7, 1997 examination reports, a Department of Labor examination report from September 6, 1996. Contained within those reports were pulmonary function studies and arterial blood gas studies. Dr. Fino opined that Claimant suffered from neither pneumoconiosis nor a totally disabling respiratory impairment. The doctor's lack of pneumoconiosis opinion was based upon 1) a negative majority of x-ray interpretations; 2) normal pulmonary function tests; and 3) normal arterial blood gas studies. The doctor's total disability opinion was based upon the latter two normal tests and studies.

Dr. Mitchell Wicker examined Claimant on September 6, 1996. (DX 24-246). The doctor took Claimant's social and medical histories, and he referenced Claimant's coal mine employment history form which displayed nearly two decades of coal mine employment. Dr. Wicker also noted a one pack per day, sixteen year cigarette smoking history for Claimant. Claimant's chief complaints were cough, sputum production, wheezing, dyspnea upon walking one-quarter mile or lifting twenty to twenty-five pounds, chest pain, orthopnea, and ankle edema. The doctor submitted Claimant to a chest x-ray, pulmonary function study, arterial blood gas study, and an electrocardiogram. In his report, Dr. Wicker stated he found no evidence of pneumoconiosis, but he provided no further rationale for his findings. Addressing Claimant's impairment level, the doctor stated, "Respiratory capacity appears to be adequate to perform his previous occupation in the coal mining industry." (Dx 24-249).

Dr. Anderson examined Claimant on March 9, 1994. (DX 24-250). The doctor recorded that Claimant worked twenty years in coal mine employment and had smoked one pack of cigarettes per day for the past fourteen years. During his physical examination, Claimant reported he suffered from shortness of breath but that he could walk one-half mile and climb two flights of stairs. Dr. Anderson administered a chest x-ray, pulmonary function test, and an electrocardiogram. The doctor interpreted the x-ray as positive for pneumoconiosis, but he found the electrocardiogram results were within normal limits. Dr. Anderson diagnosed 1) category 1/1 pneumoconiosis, and 2) a mild obstructive ventilatory defect as a result of cigarette smoking. Despite his diagnosis of pneumoconiosis, the doctor opined that Claimant retained the physical ability, from a pulmonary standpoint, to perform his usual coal mine employment or gainful work in a dust-free environment.

On September 28, 1993, Dr. John E. Meyers examined the claimant. (DX 24-256). The doctor recorded an extensive employment history, noting Claimant's twenty year coal mine employment history performing various jobs such as shuttle car operator, roof bolter, foreman, and beltline operator. Claimant complained of chest pain, dyspnea upon walking three hundred feet or climbing a flight of stairs, shortness of breath, cough, and wheezing. The doctor administered a chest x-ray, pulmonary function study, and a electrocardiogram. After his examination, Dr. Meyers diagnosed 1) coal workers' pneumoconiosis based upon Claimant's x-ray, 2) chronic obstructive pulmonary disease, and 3) hypertensive vascular disease. The doctor also opined that Claimant retained the physical ability to perform his usual coal mine employment.

Dr. Glen Baker examined Claimant on March 24, 1993. (DX 24-261). Dr. Baker registered that Claimant worked in the coal mining industry for twenty years and smoked one pack of cigarettes per day for eighteen years. Dr. Baker recorded various complaints from Claimant, including shortness of breath, cough, sputum production, dyspnea upon walking one-quarter mile, and wheezes. Claimant reported that his symptoms were aggravated by exertion, changes in the weather, and dust exposure. The doctor submitted Claimant to the standard pulmonary examination of a chest x-ray, pulmonary function test, and an arterial blood gas study. Dr. Baker diagnosed coal workers' pneumoconiosis based upon Claimant's x-ray and significant duration of dust exposure and bronchitis based upon history. The doctor concluded that Claimant lacked the physical ability, from a respiratory standpoint, to perform his usual coal mine employment or comparable work in a dust free environment because of his pneumoconiosis and bronchitis.

DISCUSSION AND APPLICABLE LAW

Because Herman Fields filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Refiled Claim

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in condition." 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether "a material change in conditions" has occurred. Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Benefits Review Board set forth its definition of "material change of conditions" under 20 C.F.R. § 725.309(d) in *Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). In *Allen*, the Board overruled its holding in *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24 (1992) and adopted the Director's position for establishing a material change in conditions under section 725.309, to wit: a claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. Moreover, the Board made clear that a "material change" may only be based upon an element which was previously denied. In *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.), the Board held that a "material change in conditions" cannot be established based upon an element of entitlement which was not specifically adjudicated against the claimant in prior litigation.

The Sixth Circuit has adopted the Director's position for establishing a material change in conditions. Under this approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement that previously was adjudicated against him. If a claimant establishes the existence of one of these elements, he will have demonstrated a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). *See Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996). In addition, the court determined that the administrative law judge must examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted." The court reasoned that such an approach "[a]ffords a miner a second chance to show entitlement to benefits provided his condition has worsened." The court wrote that "entitlement is not without limits, however; a miner whose condition has worsened since the filing of an initial claim may be eligible for benefits but after a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted." *Id.* at 998.

Applying the *Ross* standard, I must review the evidence submitted subsequent to January 24, 2000, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Claimant in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If Mr. Fields establishes any of these elements with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

Review of Newly Submitted Evidence for Material Change in Conditions

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis,

anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record contains four interpretations of two chest x-rays. Of these interpretations, three were negative for pneumoconiosis while one was positive.

Each of the physicians interpreting the x-rays of record were "B" readers. I grant Dr. Poulos's negative interpretations greater weight, however, due to his credentials as a board-certified radiologist. When I consider the additional probative value of Dr. Poulos's negative interpretations and that the preponderance of interpretations are negative for pneumoconiosis, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before

January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

I find Dr. Baker's opinion to be well reasoned and well documented. The report catalogs the doctor's full range of pulmonary testing, and Dr. Baker reaches reasonable, understandable conclusions from the results of the objective testing. Accordingly, his opinion is entitled to probative weight. I do not, however, grant his diagnosis of coal workers' pneumoconiosis probative weight because it was solely based on his x-ray interpretation and the claimant's coal dust exposure history. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute "sound" medical judgment under section 718.202(a)(4). *Id.* at 576. The Benefits Review Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113(1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Benefits Review Board explained that the fact that a miner worked for a certain period of time in the coal

mines alone "does not tend to establish that he does not have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray...and not a reasoned medical opinion." *Id.* While I grant no weight to the doctor's diagnosis of clinical pneumoconiosis, Dr. Baker's opinion provides a well reasoned, well documented opinion of legal pneumoconiosis in his diagnosis of chronic obstructive pulmonary disease. *See, e.g., Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995). I grant probative weight to the doctor's diagnosis of legal pneumoconiosis.

I grant no weight to Dr. Vuskovich's opinion concerning the presence of coal workers' pneumoconiosis for his opinion is hostile to the act. The doctor stated that simple coal workers' pneumoconiosis, without further respirable dust exposure, does not progress. The regulatory definition of pneumoconiosis clearly provides that pneumoconiosis is a latent and progressive disease. 20 C.F.R. § 718.201(c). The Board has held that the administrative law judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982). Accordingly, I grant no weight to the doctor's opinion regarding the presence of coal workers' pneumoconiosis. Conversely, I grant the doctor's opinion probative weight concerning his diagnosis of chronic obstructive pulmonary disease. The doctor's opinion documented the numerous physician opinions he credited with supporting a diagnosis of chronic obstructive pulmonary disease, and I also found it well reasoned. Accordingly, I grant the doctor's opinion concerning chronic obstructive pulmonary disease probative weight.

Like Dr. Baker, Dr. Broudy's analysis of whether Claimant suffered from pneumoconiosis appears to solely focus on x-ray interpretations. In his analysis section, the doctor provides no other rationale for his conclusion that Claimant does not have pneumoconiosis other than negative x-ray interpretations. Such reasoning does not comprise a "sound medical judgment," and I grant it no weight. *See Cornett, supra*. Dr. Broudy also diagnosed chronic obstructive pulmonary disease. I grant the opinion less weight, however, as his diagnosis is poorly reasoned. The doctor points to no medical evidence supporting such a diagnosis. Instead, he merely states that it exists. Such a failure renders his diagnosis less probative.

When I consider all of the narrative opinions as a whole, I find Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. While no opinion successfully and probatively diagnosed clinical coal workers' pneumoconiosis, each of the narrative opinions diagnosed chronic obstructive pulmonary disease. As a finding of chronic obstructive pulmonary disease satisfies the regulatory definition of legal pneumoconiosis, I find claimant has established a material change in conditions by demonstrating the presence of pneumoconiosis. Because Claimant has established a material change in conditions, I must now consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993,

997-98 (6th Cir. 1994); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996).

Review of Entire Record for Entitlement to Benefits

Pneumoconiosis and Causation

Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record contains twenty-one interpretations of sixteen chest x-rays. Of these interpretations, seventeen were negative for pneumoconiosis while four were positive.

Of the previously submitted x-ray evidence, one of the three positive interpretations was proffered by a "B" reader, whereas all fourteen negative x-ray interpretations were issued by "B" readers. Six negative interpretations were issued by "B" readers and board-certified radiologists. Because the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*,

1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

The previous narrative medical evidence included seven narrative opinions. Drs. Baker, Myers, and Anderson diagnosed pneumoconiosis, whereas Drs. Broudy, Wicker, Vuskovich, and Fino found no evidence of pneumoconiosis. I grant no weight to the opinions of Drs. Baker, Myers, Anderson, Broudy, Wicker, or Vuskovich regarding the presence of clinical pneumoconiosis.

The reports of Drs. Broudy, Anderson, Myers, and Baker and the deposition of Dr. Broudy provide no bases for their conclusions regarding the presence or absence of clinical pneumoconiosis beyond Claimant's chest x-rays and/or dust exposure. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute "sound" medical judgment under section 718.202(a)(4). *Id.* at 576. The Benefits Review Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113(1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Benefits Review Board explained that the fact that a miner worked for a certain period of time in the coal mines alone "does not tend to establish that he does not have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray...and not a reasoned medical opinion." *Id.* Accordingly, I grant the reports of Drs. Broudy, Anderson, Myers, and Baker and the deposition of Dr. Broudy no probative weight.

Furthermore, the reports of Drs. Vuskovich and Wicker omit a rationale altogether. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (holding that report is properly discredited where physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

Dr. Meyers's report also diagnoses chronic obstructive pulmonary disease. Such a diagnosis is sufficient to prove legal pneumoconiosis. I grant the doctor's opinion less weight, however, as Dr. Meyers fails to provide a rationale for his diagnosis.

The remaining opinion is Dr. Fino's report. I find the doctor's report is well reasoned and well documented. Dr. Fino presents a comprehensive summary of the evidence he reviewed, and he provides clear conclusions which appear reasonable from the evidence before him. In addition, he clearly noted the bases for his negative opinion regarding the

presence of pneumoconiosis, and it is more than a mere restatement of an x-ray interpretation. I grant the doctor's opinion probative weight.

When I consider all of the narrative evidence addressing pneumoconiosis, I find Claimant has demonstrated legal pneumoconiosis by a preponderance of the evidence. I granted four opinions some amount of probative weight on the issue of pneumoconiosis. Four concluded that Claimant suffered from legal pneumoconiosis, whereas only Dr. Fino concluded that Claimant suffered from no pneumoconiosis. Drs. Baker, Broudy, Meyers, and Vuskovich all opined that Claimant suffered from chronic obstructive pulmonary disease, and I found those portions of Drs. Baker and Vuskovich's opinions completely well reasoned and well documented. The probative value of the opinions of Drs. Baker and Vuskovich, combined with the limited probative value of the opinions of Drs. Broudy and Meyers concerning chronic obstructive pulmonary disease outweigh the probative value of Dr. Fino's opinion.

Once it is determined that the miner suffers from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). Because Mr. Fields has established over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis.

The employer has proffered evidence to show another cause for claimant's pneumoconiosis: cigarette smoking. Of the four physicians – Drs. Baker, Broudy, Meyers, and Vuskovich – opining that Claimant suffered from legal pneumoconiosis, three physicians concluded that Claimant's cigarette smoking contributed to his chronic obstructive pulmonary disease. Only Dr. Baker stated that both smoking and coal dust exposure contributed to Claimant's legal pneumoconiosis. Dr. Meyers's opinion contained no assessment of the etiology of Claimant's chronic obstructive pulmonary disease.

I grant Dr. Baker's opinion concerning the etiology of Claimant's pneumoconiosis probative weight as it is well reasoned and well documented. Furthermore, the doctor considers all of the possible causes of the pneumoconiosis, and his conclusions proceed reasonably from the evidence contained in his report.

I grant less weight to Dr. Vuskovich's opinion because he fails to explicitly state why coal mine employment was not the etiology of Claimant's pneumoconiosis. Dr. Vuskovich states that the effects of Claimant's smoking overwhelmed the effects of his industrial bronchitis, but he provides no rationale for this assertion. I find his assertion less probative when I consider that the doctor ascribed smoking and employment histories almost identical in length.

Dr. Broudy also attributed Claimant's chronic obstructive pulmonary disease only to smoking. The doctor states that "no evidence [exists] that this gentleman had any respiratory impairment from the inhalation of coal mine dust." (EX 5). Dr. Broudy, however, does not

explain this statement. The context of the doctor's opinion intimates that the doctor believes the etiology is not coal mine employment because the record is devoid of pulmonary testing *while Claimant worked in the coal mines* that demonstrates a pulmonary disorder. Such an intimation would render an opinion poorly reasoned as it contradicts the regulatory definition of pneumoconiosis as a *progressive* disease. Regardless, I accord the doctor's opinion less weight due to its vagueness.

I find the preponderance of the evidence demonstrates that Claimant's legal pneumoconiosis arose in part out of coal mine employment. The probative value of Dr. Baker's well reasoned and well documented opinion outweighs the limited probative value of the opinions of Drs. Broudy and Vuskovich.

In sum, the evidence establishes that Herman K. Fields has pneumoconiosis and that his pneumoconiosis arose out of coal mine employment. In order to establish entitlement to benefits, however, the evidence also must establish that claimant is totally disabled due to pneumoconiosis.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204 (b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.[5]

All ventilatory studies of record, both pre-bronchodilator and post- bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician

[5]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

The record contains eight pulmonary function studies. Each study conforms to the regulatory standards, and I, thus, find them valid. No pulmonary function study of record, however, produced qualifying values. I accord each study probative value as evidence that Claimant is not totally disabled.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non- respiratory factors such as age, altitude, or obesity.

The complete record contains six arterial blood gas studies. Each complies with the regulatory standards for arterial blood gas studies. Accordingly, I find them valid. None of the studies, however, produced qualifying values, and, thus, I find them probative evidence that Claimant is not totally disabled.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The newly submitted evidence contains three physicians' opinions addressing Claimant's impairment level, none of which conclude that Claimant is totally disabled. The previously submitted evidence contains seven physician's opinions, six of which concluded that Claimant was not totally disabled. Only Dr. Baker, in his March 1993 opinion, concluded that Claimant lacked the respiratory capacity to perform his usual coal mine work or comparable employment. This opinion contradicts his later opinion located in the newly submitted evidence. All of the opinions of record are uniform in their assessments of the exertional requirements of Claimant's coal mine employment.

Each of the thirteen opinions of record administered or reviewed valid pulmonary function tests and arterial blood gas studies. In addition, each opinion cited the objective results in their conclusions. I find all the opinions of record addressing Claimant's impairment level well reasoned and well documented. I grant them each the appropriate probative weight. I accord Dr. Baker's opinions less weight, however, due to the inconsistent opinions he produced. The Benefits Review Board instructs that it is proper to accord little probative value to a physician's opinion which is inconsistent with his or her earlier report or testimony. *Hopton v. U.S. Steel Corp.*, 7 B.L.R. 1-12 (1984) (holding that failure to explain inconsistencies between two reports which were eight months apart rendered physician's conclusions of little probative value); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-799 (1984)(holding physician's report discredited where he found total disability in earlier report and then, without explanation, found no total disability in report issued five years later). *See also Brazzale v. Director, OWCP*, 803 F.2d 934 (8th Cir. 1986) (holding physician's opinion may be found unreasoned given inconsistencies in the physician's testimony and other conflicting opinions of record). Dr. Baker's later report provides no explanation for the reversal in his opinion.

In sum, the narrative evidence addressing total disability is overwhelmingly weighted toward the conclusion that Claimant is not totally disabled. Only Dr. Baker's March 1993 opinion reflects differently, and its probative value is lessened by Dr. Baker's February 2001 opinion reaching the opposite conclusion.

The record as a whole reveals a paucity of evidence in support of a finding that Claimant is totally disabled. The great weight of the narrative reports, all of the arterial blood gas studies, and all of the pulmonary function tests weigh in favor of a negative finding. Accordingly, I find Claimant is not totally disabled.

Conclusion

In sum, the evidence establishes the existence of pneumoconiosis and, concomitantly, a material change in condition, but the evidence does not establish the existence of a totally disabling respiratory impairment. Accordingly, the claim of Herman K. Fields must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Herman K. Fields for benefits under the Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.